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DEPARTMENT OF TRANSPORTATION

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OFFICE OF THE SECRETARY

Additional Guidance on Airfare/Air Tour Price Advertisements

AGENCY: Office of the Secretary, Department of Transportation

ACTION: Notice Providing Additional Guidance on Airfare/Air Tour Price Advertisements

SUMMARY: The Department is publishing the following notice providing additional guidance on airfare/air tour price advertisements.

FOR FURTHER INFORMATION CONTACT: Nicholas Lowry, Attorney, Office of Aviation Enforcement and Proceedings (C-70), 1200 New Jersey Ave., S.E., Washington, D.C. 20590, (202) 366-9349

ADDITIONAL GUIDANCE ON AIRFARE/AIR TOUR PRICE ADVERTISEMENTS

NOTICE

This notice provides additional guidance to airlines and ticket agents that market prices for air transportation, air tours, or tour components in connection with air transportation regarding the full fare advertising rule. It describes several airline and ticket agent practices that the Office of Aviation Enforcement and Proceedings (Enforcement Office) considers to violate section 399.84 and/or to be unfair and deceptive and/or an unfair method of competition in violation of 49 U.S.C. 41712. The purpose of this notice is to urge voluntary compliance by airlines and ticket agents and to announce the office's intention to pursue enforcement action where it discovers such practices, as appropriate.

SEPARATE LISTING OF TAXES AND CARRIER FEES

If a vendor chooses to make available information regarding the amount of taxes and/or fees that are included in the full fare, the disclosure must accurately distinguish between taxes and government fees on the one hand and carrier-imposed fees on the other. In addition, with respect to information about carrier-imposed fees included in the full fare, such disclosure must accurately represent the actual cost of the item for which the charge is assessed and must not otherwise be deceptive.

Under past policy that expired on January 25, 2012, fare advertisements were permitted to state, separately from the base fare, government fees and charges that were not *ad valorem* in nature. Carrier-imposed charges, such as fuel or security surcharges, had to be included in the base fare initially presented to consumers on website displays, but carriers were allowed to break out these charges, along with all government taxes and fees, in subsequent screens or through pop-ups or hyperlinks. We have found, in reviewing airline websites, that many websites which detailed additional fees labeled all additional charges, government and carrier-imposed, as taxes when in fact carrier-

imposed fees were often the major portion of these fees. Such displays were deceptive and in violation of section 41712.

The Department's new consumer rule, "Enhancing Airline Passenger Protections," 76 Fed. Reg. 23110 (Apr. 25, 2011), requires, among other things, that the first price quote presented must be the full price, including all taxes, fees and all carrier surcharges. This full price provision became effective January 26, 2012. In response to concerns expressed by carriers, the Department made clear in the preamble to the rule that advertisers are free to advise the public in price solicitations about government taxes and fees as well as carrier- or agent-imposed fees that are included within the single total price, so long as that notice is not deceptive. For example, as we explained in the final rule, sellers of air transportation may have pop-ups or links adjacent to an advertised price to take the consumer to a listing of such charges, or they may display these charges on the same page in a less prominent manner than the total price if they prefer.¹ In particular, the Department noted that any such charges must be displayed on a per-passenger basis, accurately reflect the actual costs of the service covered, and not otherwise be deceptive. (14 CFR 399.84, 76 Fed. Reg. 23110, 23143). When a cost component is described as a fuel surcharge, for example, that amount must actually reflect a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline calculated based on such factors as the length of the trip, varying costs of fuel, and number of flight segments involved.² Another example of a solicitation likely to deceive and therefore prohibited under the rule is a presentation of a fare as a "total" fare if it does not include government taxes and fees or other mandatory charges.

¹ See also Office of Aviation Enforcement and Proceedings, DOT, Answers to Frequently Asked Questions, at 22 (Aug 19, 2011, revised Sept. 6, 2011, and Oct 19, 2011), available at http://airconsumer.ost.dot.gov/rules/EAPP_22_FAQ_10-19-2011.pdf.

² For example, descriptions such as the following would be acceptable: "Fare includes a fuel surcharge. On average our passengers paid \$xx.xx more for fuel during 2011 in their ticket price than they did in 2000;" or "Fares include a charge for fuel. On average in 2011 our passengers paid \$xx.xx for fuel as a part of their ticket price." Of course, such assertions must be based on the carrier's actual paid enplanements and fuel expenditures.

It has come to our attention that some carriers and ticket agents are providing notice of the cost components of airfares on their website reservations systems in ways that are unfair and deceptive in violation of section 41712. In some instances, the advertiser appears to properly include government taxes and fees, as well as mandatory carrier- or agent-imposed fees, in the initial fare quotations and itinerary selections. However, on the page confirming the itinerary selection, or on the fare quotation purchase page, where component costs are displayed, a general category contains costs described as “Taxes” or “Taxes incl 9/11 fee” that actually include a carrier’s “fuel surcharge” and/or other fees not imposed by a government. In one particular example, the total fare for a U.S-Europe trip appears to be properly listed as \$769.41 on the initial itinerary pages, but the confirming page describes the total as being composed of a “Price” of \$170 and “Taxes incl 9/11 fee” of \$599.41. A further description of the “Taxes incl 9/11 fee” discloses that the amount of \$599.41 includes an amount of \$476 described as a “fuel surcharge” and an amount of \$33.78 described as a “Passenger service charge international.” These charges are not government-imposed taxes and fees, and it is an unfair and deceptive practice and an unfair method of competition in violation of section 41712 to lead consumers to believe that they are.³

In another example of non-government charges being included in an amount described as “taxes,” advertisers present a category described as “taxes and fees” where the amount in that category includes not only government-imposed taxes and fees but carrier- or agent-imposed fees, the latter of which may include “fuel surcharges,” “convenience” fees, or other mandatory fees. Combining government-imposed taxes and fees with those imposed by carriers or agents is likely to confuse consumers and deceive them into believing the government taxes and fees associated with their airfare are higher than they actually are. Therefore, advertisers who desire to separately list government taxes and fees as well as carrier- or agent-imposed fees should ensure that they are not lumped

³ We note that section 1104 of the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-94, 126 Stat.11 (2012), includes an amendment to the tax code that also may bear on what may be included under a breakout of taxes in airfare advertising.

together and described as “taxes and fees.” Language such as “Taxes and carrier-imposed fees” would be acceptable, for example.

Moreover, using the particular example noted above, we wish to remind carriers that amounts listed as charges for particular services must accurately reflect the actual costs of the service covered. Therefore, the “fuel surcharge” of \$476 in the above example, which is associated with a transatlantic trip originating in New York City, must be an accurate reflection of the fuel cost over some reasonable baseline for an individual passenger for that trip and the carrier should be prepared to detail the services and costs per passenger associated with its “Passenger service charge international.”

In a similar vein, we have observed that carriers may add “fuel surcharges” or other fees to their frequent flyer ticket offerings, some in an amount of several hundred dollars. Any such charges assessed also must be fairly disclosed and an accurate reflection of the actual costs as described above.

ADVERTISING EACH-WAY FARES BASED ON A ROUNDTrip PURCHASE

Under section 399.84(b), airlines and ticket agents are permitted to advertise airfares on an each-way basis when a roundtrip purchase is required provided that the roundtrip-

purchase requirement is clearly and conspicuously noted in the advertisement and is stated prominently and proximately to the each-way fare amount. The Department has historically allowed the marketing of each-way fares because it facilitates the pricing and sale of “open jaw” itineraries (outbound flights to one city and return flights from a different one, e.g. Washington to Amsterdam with the return flight from Paris to Washington). Such marketing also can provide consumers better fare information where different prices exist for outbound and return flights because one is in the high season or on a weekend and the other flight is not.

In the past, we have noted understandable variations in the price of outbound and return flights sold on an each-way basis. For example, fares could vary based on whether the travel was during high, low or shoulder seasons, whether it was on a weekend or a weekday or whether it was on flights during peak holiday periods or on other busy travel days. Fares also could vary depending on the number of segment-related taxes and government fees that might apply and for international travel the varying U.S. and foreign arrival and connecting point taxes and government fees that might apply. Until recently the variation in each-way fares by direction was not a regulatory concern.

Subsequent to the January 26, 2012, effective date of the full fare advertising rule we observed that one carrier was offering outbound each-way fares to European points that appeared to be deceptively low in comparison to the return flight fares. In one case an outbound Washington to Paris fare on February 22, 2012, was advertised at \$102 with a return flight on February 29, 2012, advertised at \$629 or more than 600% higher. Even more troubling, a seat on the same February 29 flight was being offered for only \$233 if it was bought as part of a Paris-originating roundtrip to Washington. The only reasonable explanation for such variations is that the carrier intended to bait the passenger with an unrealistically low outbound fare and to induce passengers to buy the roundtrip ticket at a substantially higher price than any reasonable person would expect at the beginning of the search process. We view such tactics as being unfair and deceptive and amounting to an unfair method of competition.

The requirements and guidance discussed above, it should be noted, extend to travel agents and other non-airline vendors of air transportation. Questions regarding this notice may be addressed to the Office of Aviation Enforcement and Proceedings (C-70), 400 7th St., S.W., Washington, D.C. 20590. The office will provide those subject to the full fare advertising rule and 49 U.S.C. 41712 60 days subsequent to the date of this notice to ensure they are in compliance before instituting enforcement action related to the issues covered in this notice.

By:

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***Assistant General Counsel for
Aviation Enforcement and Proceedings***

Dated: February 21, 2012

(SEAL)

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